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CHARLES ELM

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

No. [redacted] 22

IRVING TRUST COMPANY, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., a Delaware corporation,

Petitioner,

against

A. W. PERRY, INC., a Massachusetts corporation,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI

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IRVING TRUST COMPANY, as Trustee in Bankruptcy of Outfitters Operating Realty Co., Inc., a Delaware corporation,

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against

A. W. PERRY, INC., a Massachusetts corporation,

Respondent.

BRIEF OF THE RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

Statement.

The statement of the matter set forth in the petition is substantially correct, except in one important respect. In summarizing the opinion of L. HAND, J. (R. 52-55) petitioner ascribes to the opinion the following holding (page 3 of the Petition):

> "* * * that, to avoid the possibility of the promise here made constituting a penalty, it was to be interpreted as providing for the discounting of the minuend, *i. e.*, the rent reserved for the residue of the term."

The opinion does not direct that either the minuend or the subtrahend (the fair rental value for the remainder of the term) be discounted. The measure of damages laid down is explicit and fair. The opinion states (R. 55):

> "* * * that the proper measure of damages is the sum of the discounted *series of* installments, *each* made up of the rent reserved, less the fair rental value for that period." (Italics ours.)

Opinions Below, Jurisdiction and Statute Involved.

The report of the opinions below, the jurisdiction of this Court and the statute involved have been fully set forth in the petition for the writ and the brief filed in support thereof.

Summary of Argument.

1.

The claim may be proved under Section 63 of the Bankruptcy Act.

2.

There is no historical basis for the disallowance of the claim.

3.

The Express Covenant of the lease requires the allowance of the claim.

4.

The damages measured in accordance with the provisions of the lease do not constitute a penalty.

5.

The fair rental value for the remainder of the term is readily ascertainable.

Reasons Why the Writ Should Not Issue.

The questions involved depend primarily upon the construction of a special covenant in a lease. By exercising jurisdiction in this case the Court will not dispose of any general questions affecting the allowance of claims in bankruptcy. This Court clearly intimated in *Manhattan Properties, Inc.* v. *Irving Trust Company,* 54 Sup. Ct. Rep. 385, that an agreement which made the filing of a petition in bankruptcy *ipso facto* a breach of the lease and in addition measured the damages by the difference between the rental value and the rent reserved, would be the basis of a provable claim. By allowing respondent's claim in the instant case the Circuit Court of Appeals has merely conformed to the views of this Court. The holding is not contrary either to statute or to prior decisions, but is in conformity therewith.

ARGUMENT.

1.

The Claim May be Proved Under Sec. 63 of the Bankruptcy Act.

The claim in the instant case is founded upon an express contract. By its terms the lease terminates *ipso facto* in the event of bankruptcy. The damages agreed upon in the lease are susceptible of liquidation. The claim is not contingent upon entry, reletting or any other contingency.

2.

There is no Historical Basis for the Disallowance of the Claim.

While it is true that the lower Federal courts in most circuits have repeatedly refused to allow claims for loss of future rentals, an examination of the cases indicates that the decisions were always for cogent reasons readily understandable. Sometimes reentry was doubtful; again the loss, if any, was not ascertainable or could not be definitely ascertained until the end of the term, or the measure of damages constituted a penalty. Nowhere was any definite rule laid down excluding claims for damages based on loss of rent, as such. In *Manhattan Properties, Inc.* v. *Irving Trust Company,* 66 F. (2d) 470, the Court of Appeals for the Second Circuit expressed the view, with apparent reluctance by the judge who wrote the opinion, that *In re Roth & Appell,* 181 Fed. 667, had become the settled law of the circuit. Yet the *Roth* case clearly suggested that the parties to a lease might agree that bankruptcy should terminate it and upon such termination all future installments of rent become, at once, due and payable. The measure of damages in *Kothe* v. *R. C. Taylor Trust,* 280 U. S. 224, followed this formula and was held, quite properly, to constitute a penalty. Finally this Court affirmed *Manhattan Properties, Inc.* v. *Irving Trust Company, supra,* yet went no further in discussing the trend of the decisions, than to say that it had not "expressed disapproval of the rulings of the great majority of the lower Federal courts."

The petitioner in the first point of its argument (p. 17), referring to the intent not to depart from the alleged precedents disallowing claims for damages based on loss of rents, quotes from the decision of this Court in the *Manhattan Properties, Inc.,* case, *supra,* as follows:

> "In this situation 'only compelling language in the statute itself would warrant rejection of a construction so long and so generally accepted * * *.'"

This Court quoted the above language from the opinion in *Maynard* v. *Elliott,* 283 U. S. 273. The court there was referring to a rule allowing claims predicated upon the liability of a bankrupt indorser of commercial paper which had not been "seriously challenged" for twenty-six years. Moreover, the Court qualified the requirement of "compelling language in the statute" by adding (p. 277):

> "* * * especially where overturning the established practice would have such far reaching consequences as in the present instance."

The distinction between the established liability of indorsers and that of parties to a lease, where the liability may be as broad as the language of the contract, is too obvious to discuss. No definite rule excluding all claims for damages based on loss of rent has ever been formulated, despite the trend of decisions in that direction. Hence the court below has not rejected any accepted construction of the law. Nor does the allowance of the claim in the instant case have any far reaching consequences since the lease stands on its own footing and is not a precedent for the allowance of other claims unless based on identical language.

It is difficult to perceive how the claim in the instant case can be disallowed, so clearly is it within the word of the statute and not contrary to settled law, unless, indeed, the courts are to legislate by judicial construction. Certainly, were the bankrupt an individual, the refusal to allow this claim would be extremely onerous upon the debtor. Since the debtor is a defunct corporation the rejection of the claim would have been an undue hardship upon the creditor.

3.

The Express Covenant of the Lease Justifies the Allowance of the Claim.

The petitioner argues (Point I, p. 17, of its brief) that the inclusion of an Express Covenant in the lease for damages is not sufficient reason for the allowance of the claim. But the petitioner bases its argument upon a misconception of the law. It refers to the allowance as "an exception to the general rule" although no general rule is shown unless numerous decisions each rejecting claims for specific, understandable and proper reasons, none of which are present in the instant case, can be said to establish a rule. And it characterizes the claim as "otherwise non-provable" except for certain important covenants. This argument is without force since admittedly the claim would be non-provable if it possessed the defects of, say, the claim in *Kothe* v. *R. C. Taylor Trust, supra.* We refer to the opinion of the court below quoted at page 19 of petitioner's brief as a complete answer to petitioner's objection.

4.

The Damages Measured in Accordance with the Provisions of the Lease do Not Constitute a Penalty.

In Point II of its brief (p. 24) petitioner contends that the minuend clause in the lease "sounds in penalty rather than liquidated damages." Petitioner refers to the decision of this Court in *Kothe* v. *R. C. Taylor Trust, supra.*

It is difficult to understand petitioner's argument in this respect except by reference to its misconception of the decision of the court below hereinbefore referred to in the statement in this brief (p. 1). Concededly, if the damages to be paid consisted of only the minuend, *i. e.*, the rent reserved for the balance of the term, this would

clearly constitute a penalty, under the *Kothe* case. But the damages are something very much less than the minuend alone. They consist of the minuend *minus* the subtrahend, with the series of remainders thus found (calculating the damages by years, or even by months) discounted to their value at the date of breach. In *William Filene's Sons* v. *Weed*, 245 U. S. 597-602, this Court said that the liquidation of damages in this manner was "upon a footing familiar and fair." Although the *Filene* case was one in equity, nevertheless this characterization of damages thus calculated, and the allowance thereof, is a holding by this Court that such damages do not constitute a penalty.

The court below did not read into the lease a provision for discounting the future rent because the clause as drawn was inadequate. Clearly the direction that the remainder ascertained by deducting the fair rental value from the rent reserved be discounted was nothing more than instructions as to the method of calculating the damages. As to the adequacy of the language of the lease, it is significant that it corresponds with exactness to the hypothetical case suggested by this Court in the concluding paragraph of its opinion in *Manhattan Properties, Inc.* v. *Irving Trust Company, supra.*

5.

The Fair Rental Value for the Remainder of the Term is Readily Ascertainable.

Petitioner contends (p. 27 of its brief) that even though liability has attached, the valuation of the claim may be impossible. It is suggested that a month-to-month inquiry for the balance of the term as to the fair rental value will be necessary. This, however, does not create any barrier provided testimony in this respect can be offered with fair certainty. As the property has been

leased again for a portion of the remaining term, the fair rental value of the whole of said term may be fixed without conjecture or speculation. Certainly the damages may be ascertained with equal, if not greater certainty, than was possible in *Central Trust Co.* v. *Chicago Auditorium,* 240 U. S. 581, where the value of a cab privilege was to be fixed, or *In re Marshall's Garage,* 63 F. (2d E.) 759, where the present valuation of land was accepted as a permissible subtrahend for calculating damages on a breach of contract to buy five years later.

The petitioner's brief (p. 28) refers to a provision of the lease under which the rent might be abated as creating a difficulty in fixing the fair rental value. This clause, however, is immaterial, since the parties have agreed on damages as the difference between two amounts presently ascertainable. The bankruptcy court is not required to liquidate a future loss, but merely to carry out the express contract of the lessee that it shall pay a sum to be ascertained by an assessable standard. The instant case cannot be compared with the facts in *Dunbar* v. *Dunbar,* 190 U. S. 340, where the Court was asked to speculate upon the probability of a widow remarrying. The citation of this case, so patently dissimilar to the present one is, we believe, evidence of the lack of force to the suggestion that the fair rental value for the balance of the term cannot be readily ascertained.

Conclusion.

The brief filed by the trustees of Louis K. Liggett Company *amici curiae* does not set forth the exact provisions of any of the four leases in that bankruptcy now awaiting determination in the lower court. It is not possible to conjecture, therefore, whether the granting of a writ in the instant case will have any bearing on the Liggett matter. The obvious purpose of the Liggett Trustees is to urge a drastic rule excluding all lessors as claimants

regardless of the covenants of the lease. Such rule would not serve the broad purpose of the Bankruptcy Act.

The *amici curiae* state (Point III of their brief) that the clause construed herein "is now in general use." This is hardly accurate since in the Liggett bankruptcy, involving four hundred leases, only four such claims are said to have possibilities of allowance. Indeed it is doubtful that many landlords would be content to so contract since contingencies might arise making such agreements particularly onerous for the lessor. Having so contracted they are entitled to the benefit of their agreement which clearly supports a provable claim.

The writ of certiorari herein sought should not be granted.

Respectfully submitted,

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